STATE OF MICHIGAN

COURT OF APPEALS

WALLY BOELKINS,

Plaintiff-Appellant,

v

DOUGLAS HOPKINS,[1]

Defendant,

and

GRATTAN TOWNSHIP and RICHARD HERWEYER,

Defendants-Appellees.

UNPUBLISHED
July 22, 2003

No. 238427
Kent Circuit Court
LC No. 00-002529-NZ

Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm.

Plaintiff filed a complaint against defendant Grattan Township and building inspector Douglas Hopkins alleging improper withholding of a building permit. Thereafter, plaintiff filed an amended complaint alleging "negligent enforcement" and "deprivation of civil rights" arising from the failure to issue a building permit for an individual lot within a condominium project despite plaintiff's ownership of the lot. The trial court dismissed the complaint following motions for summary disposition. The trial court concluded that the state law claims were dismissed with prejudice based on governmental immunity. The trial court held that plaintiff's claim premised on 42 USC 1983 was dismissed without prejudice for failure to exhaust administrative remedies. The order granting summary disposition provided that plaintiff could file an amended complaint pursuant to MCR 2.116(I)(5).

[1] The dismissal of Douglas Hopkins is not an issue on appeal.

Plaintiff filed a second amended complaint against defendants Grattan Township and Richard Herweyer, township supervisor. Therein, plaintiff alleged that he applied for the issuance of a building permit for construction of a condominium. Plaintiff alleged that five other applications were also received by defendant Grattan Township for the same condominium project, and building permits issued without proof of ownership. Defendants refused to issue a building permit to plaintiff and demanded proof of ownership from him. Furthermore, defendant Herweyer allegedly issued a stop work order regarding plaintiff's basement construction. Despite zoning violations in the construction of the five other condominiums at the site, defendants allegedly did not stop the construction from proceeding. Plaintiff sent proof of ownership to defendants in June and August 1998. Consequently, plaintiff was forced to purchase a summer home in a different location in May 1998. Plaintiff alleged damages as a result of "negligent and unequal enforcement" and "deprivation of equal protection."

Defendants moved for summary disposition, alleging that a due process violation could not be maintained for an erroneous denial of a building permit. By statute, a township was required to issue a building permit to the owner of property or someone with written authorization from the owner to obtain the permit. Defendants received written correspondence from Sidney J. Helder, president of the Ivy Park Condominium Association, that plaintiff was not the owner of the unit for which he had requested a building permit. Based on the written notice, defendants requested proof of ownership from plaintiff. In deposition, plaintiff testified that Helder was his brother in law. Plaintiff further testified that he did not take action with respect to proof of ownership until August 1998, four months after he purchased property in another location. Thus, defendants alleged entitlement to summary disposition where the denial of the building permit was based on statutory authority, and plaintiff failed to exhaust his administrative remedies with the board of appeals.

Plaintiff opposed the motion for summary disposition, alleging that defendants' failure to require uniform proof of ownership from all condominium lot owners was a denial of equal protection. Plaintiff further alleged that defendants were not entitled to governmental immunity because the authority to issue building permits and stop work orders was given to the building inspector, not defendant Herweyer. Thus, defendants were not entitled to governmental immunity where their actions were unauthorized or ultra vires activity. Plaintiff further alleged that action before the board of appeals was permissive, not mandatory, and therefore, summary disposition was inappropriate.

The trial court stated that the litigation arose out of a family business dispute and that plaintiff's anger was misdirected toward defendants. The trial court granted the motion for summary disposition, relying on its prior ruling regarding governmental immunity with respect to defendant Grattan Township. The trial court further held that plaintiff could have provided the proof of ownership as required by statute or could have pursued administrative remedies. Therefore, summary disposition for defendants was proper. Lastly, the trial court noted that plaintiff could amend his complaint to pursue "the real culprit here," his brother in law, Helder.

Plaintiff first alleges that the trial court erred in dismissing the state law claims against defendants. We disagree. An appellate court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions,

admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6); *Maiden, supra*.

A governmental agency that engages in activity that is expressly or impliedly mandated or authorized by constitution, statute, or other law is performing a governmental function and is immune from tort liability. *Palmer v Western Michigan Univ*, 224 Mich App 139, 141; 568 NW2d 359 (1997). Authorization is necessarily implied it if is essential to the exercise of authority that is expressly granted. See *Michigan Muni Liability & Prop Pool v Muskegon Co Bd*, 235 Mich App 183, 191; 597 NW2d 187 (1999). Ultra vires acts, acts outside the scope of authorization, are not entitled to immunity protections. *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 620, 633-634; 363 NW2d 641 (1984).

Plaintiff contends that defendant Herweyer's deposition testimony established that he was not authorized to issue a building permit or issue stop work orders, and therefore, defendants denial of the request for a building permit was ultra vires activity, not governed by immunity protection. We disagree. After the in-house building inspector died, defendant Grattan Township decided to contract for building inspector services based on the small size of the township. Defendant Grattan Township retained Imperial Municipal Services to perform building, electrical, and mechanical inspections. Imperial Municipal Services had contracts with nine different townships, and Hopkins performed the building inspections for defendant Grattan Township on a part-time basis. Defendant Herweyer was the township supervisor, a part-time position. He acknowledged that the building inspector, Hopkins, had the general authority to issue building permits and stop work orders. However, defendant Herweyer testified that he had the authority to act in the absence of the building inspector when a situation required immediate attention. He further testified that his authority was to provide general services as the township's head administrator. This authority included issuance of civil infractions and execution of contracts. Defendant Herweyer was also given additional duties and authority as assigned by the township board. Thus, in the absence of a full-time building inspector, defendant Herweyer's deposition testimony established his implied authority to act when necessary. See *Michigan Muni, supra*. Plaintiff did not submit any documentation to refute the implied authority testimony given by defendant Herweyer. *Quinto, supra*.

By statute, a building permit must be submitted by the owner, the owner's builder, architect, engineer, or agent. MCL 125.1510(1). Plaintiff's brother in law, in his capacity as president of the condominium association, notified defendants of the dispute with respect to the ownership of plaintiff's lot. Defendants did not receive notice that the ownership of any other lot within the association was in dispute. Consequently, defendants requested proof of ownership as required by MCL 125.1510. Irrespective of whether defendant Herweyer or Hopkins requested the proof of ownership, the activity was authorized by statute in the performance of a governmental function and entitled to immunity protection. *Palmer, supra.*

Plaintiff next alleges that he was an owner for purposes of MCL 125.1510 and that perspective vendees are qualified to act as the owner. We disagree. Issues of statutory

construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). This determination is accomplished by examining the plain language of the statute itself. *Id*. If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

Review of the plain language of the statute, *Cruz, supra*, at issue reveals that an application for a building permit must be submitted by the owner or the owner's agent. MCL 125.1510(1). A person shall not be recognized as the owner's agent without proper documentation. MCL 125.1510(2). In his deposition, plaintiff testified that he was an experienced businessman, who held partnership interests in the Ivy Park condominium association, and had purchased other properties. Plaintiff acknowledged that the township in which he purchased the summer home in May 1998, required proof of ownership. Plaintiff testified that he had been involved in other business dealings where proof of ownership was required. Despite this knowledge, plaintiff testified that he did nothing to establish ownership to defendants because he did not "think that it was necessary" and that he was "ticked off." Instead, plaintiff purchased property in May 1998, shortly after the dispute over ownership began, and submitted documentation after he no longer had any need to build the condominium at issue. Furthermore, plaintiff submitted documentation of ownership in August 1998, with a copy of the deed from June 1998, but did not submit the documentation with the filing fee and request for a building permit. Plaintiff testified that he had a cancelled check to demonstrate his ownership interest in the property, but he did not produce it for defendants. Thus, plaintiff did not produce documentation of ownership in accordance with MCL 125.1510. Therefore, this issue is without merit.

Plaintiff next alleges that he was not required to exhaust administrative remedies prior to filing this litigation. We disagree. The general rule is that persons seeking authorization from a governmental unit must exhaust their remedies within the governmental unit before seeking relief in court. *Trojan v Township of Taylor*, 352 Mich 636, 638-639; 91 NW2d 9 (1958); *Lake Angelo Assoc v Township of White Lake*, 198 Mich App 65, 74; 498 NW2d 1 (1993). A claim that governmental regulation effects a taking is not ripe until the entity charged with administration of the regulation has reached a final decision regarding the application of the regulation to the disputed property. *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 (1985). The purpose behind the finality rule is to determine that there actually was a taking. *Lake Angelo, supra*. Plaintiff admitted in deposition testimony that he did not provide documentation regarding proof of ownership and did not contact defendants to resolve the issue of ownership. Rather, he purchased property elsewhere, and months later, submitted proof of ownership without any request for a building permit. Thus, plaintiff's damage claim based on defendants' enforcement of the statute at issue is not ripe for appellate review. *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 79; 445 NW2d 61 (1989).

Affirmed.

/s/ Michael R. Smolenski
/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood